



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-N- INC.

DATE: JAN. 3, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of data integration and business analytics services, seeks to employ the Beneficiary as an infrastructure engineer. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign professional with a master’s degree, or a bachelor’s degree followed by at least five years of experience, for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the position’s proffered wage.

On appeal, the Petitioner submits additional evidence and asserts that the Director erroneously focused on an unavailable federal tax return, disregarding other evidence of its ability to pay the wage.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer applies for certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the United States has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a foreign national to permanently fill an offered position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).¹ Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the proffered wage, the Agency considers whether the business generated sufficient amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

Here, the accompanying labor certification states the proffered wage of the offered position of infrastructure engineer as \$165,318 a year. The Petitioner did not submit evidence of payments to the Beneficiary in 2017, the year of the petition's priority date. Based on wages paid, the Petitioner therefore did not demonstrate its ability to pay the proffered wage.

The Petitioner submitted copies of audited financial statements for its 2016-17 fiscal year, which ran from April 1, 2016, to March 31, 2017. Because this period includes the petition's priority date, the audited financial statements constitute required evidence of the Petitioner's ability to pay the proffered wage. The financial statements reflect net income of -\$4,151,179 and net current assets of -\$229,491. Therefore, based on examinations of the Petitioner's wages paid, its net income, and its net current assets, the record does not demonstrate its ability to pay the proffered wage.

Also, USCIS records indicate the Petitioner's filing of three petitions for other beneficiaries that remained approved after this petition's priority date.³ A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that remained approved after January 11, 2017. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay combined proffered wages of multiple petitions).

¹ This petition's priority date is January 11, 2017, the date the DOL received the accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

³ USCIS records identify the other petitions by the following receipt numbers: [REDACTED] and [REDACTED]

In any future filings in this matter, the Petitioner must provide the proffered wages and priority dates of its other petitions. It should also provide evidence of any wages it paid the other beneficiaries in 2017, and indicate if a petition was withdrawn, denied, or revoked, or if a beneficiary obtained lawful permanent residence.

On appeal, the Petitioner asserts that the Director denied the petition because, contrary to her request for additional evidence (RFE), the Petitioner did not submit a copy of its federal income tax return for 2016. In its RFE response, the Petitioner explained that it had not yet filed the return, which was not due until the following month.

The Director's decision cites the Petitioner's missing 2016 tax return, which the Petitioner submits with the appeal. But the decision also considers the company's audited financial statements for 2016-17. The record therefore does not support the Petitioner's assertion that the Acting Director based her denial solely on the absence of the 2016 tax return. Moreover, the Petitioner's tax return for 2016 does not establish its ability to pay the proffered wage. Covering the same period as the Petitioner's financial statements for 2016-17, the return reflects net income of -\$6,833,625 and net current assets of -\$9,495,832.

The Petitioner's remaining evidence on appeal also does not demonstrate its ability to pay the proffered wage. Documentation of prior funding from its parent company does not establish its ability to pay after the petition's priority date of January 11, 2017. As the Petitioner argues, the amounts on customer orders and invoices from 2016 and 2017 exceed the Beneficiary's proffered wage. But the record does not establish that these revenues will also cover the Petitioner's other expenses. Indeed, although the funding from its parent, its revenues, and its bank account balances far exceeded the proffered wage, the audited financial statements indicate that the Petitioner lost more than \$4 million in 2016-17 and more than \$10 million since its founding in 2013, while the 2016 tax returns report over \$6 million in losses in 2016-2017.⁴ The Petitioner's evidence on appeal therefore does not demonstrate its ability to pay the proffered wage.

As previously indicated and as the Petitioner urges, we may consider circumstances beyond its net income and net current assets in determining its ability to pay the proffered wage. Under *Sonegawa*, we may consider: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic expenses or losses; its reputation in its industry; whether the Beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay the proffered wage. See *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

⁴ The Petitioner's bank statements cover periods that largely overlap those of its tax returns and audited financial statements. The record does not establish that the bank funds represent monies available to pay proffered wages beyond the cash listed in the Petitioner's tax returns and financial statements that we already considered as net current assets.

Here, the record indicates the Petitioner's employment of about 30 people and recent growth in its revenues. But unlike in *Sonegawa*, the Petitioner has conducted business for less than five years and lacks a financial history of profits. The record also does not establish the Petitioner's incurrence of uncharacteristic expenses or losses, its possession of an outstanding reputation in its industry, or the Beneficiary's replacement of a current employee or outsourced service. In addition, the Petitioner must demonstrate its ability to pay the combined proffered wages of multiple beneficiaries. Thus, under *Sonegawa*, a totality of circumstances does not establish the Petitioner's ability to pay the proffered wage.

III. CONCLUSION

The record on appeal does not demonstrate the Petitioner's continuing ability to pay the proffered wage, from the petition's priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of F-N- Inc.*, ID# 932975 (AAO Jan. 3, 2018)